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Issue Date: 17 March 2003

CASE NO.: 2001-LHC-3232
(formerly 1998-LHC-2437)

OWCP NO.: 06-154457

IN THE MATTER OF:

MILTON E. DUCOTE

Claimant

v.

WORKTEC

Employer

and

EMPLOYER'S INSURANCE
OF WAUSAU

Carrier

APPEARANCES:

JOSEPH G. ALBE, ESQ.
For the Claimant

JOHN S. GONZALEZ, ESQ.
For the Employer/Carrier

BEFORE: Lee J. Romero, Jr.
Administrative Law Judge

DECISION AND ORDER

This is a claim for a Section 22 Modification of compensation benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901, et seq. (herein the Act), brought by Milton Ducote (Claimant) against Worktec (Employer) and Employer's Insurance of Wassau (Carrier).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. Pursuant thereto, Notice of Hearing was issued scheduling a formal hearing on April 5, 2002, in Metairie, Louisiana ("Supplemental Hearing").

Although other issues were raised by Claimant in his LS-18, the Supplemental Hearing was limited to the sole issue of identifying which outstanding bills under my previous Decision and Order were to be paid by Employer/Carrier in an effort to expedite Claimant's recovery of medical expenses associated with the previous Decision and Order. All parties were afforded a full opportunity to adduce testimony and offer documentary evidence.

At the Supplemental Hearing, the parties reached an agreement regarding Claimant's prior medical expenses, and a Supplemental Order regarding the agreement was issued on June 11, 2002. Claimant's remaining issues were scheduled for a formal hearing on August 15, 2002, at which time all parties were again afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs.[1] Claimant offered 14 exhibits which were received into evidence as CX-13 through CX-16, CX-18, CX-27, CX-29 through CX-35 and CX-37. Employer/Carrier proffered 8 exhibits which were admitted into evidence as EX-1 through EX-8.

The record was left open for the parties to obtain the medical records of a treating physician, for Employer/Carrier to submit an LS-208, for Claimant to gather pleadings in support of his position that his modification request is timely, and for Claimant to decide whether to depose a vocational expert or seek enforcement of a hearing subpoena issued to the vocational expert. On September 9, 2002, Employer/Carrier submitted its September 24, 1999 LS-208, which was marked for identification as EX-9 and received into evidence. On September 24, 2002, Claimant submitted copies of pleadings and correspondence relating to his "Application for Default Pursuant to Section 18(a) of the Act," which were received as CX-36. Thereafter, Claimant submitted further documents which were received as CX-36A through CX-36G and CX-39A through CX-39F.

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[1] References to the transcript, supplemental transcript, and exhibits are as follows: Transcript: Tr.___; Supplemental Hearing Transcript: Supp. Tr. ___; Claimant's Exhibits: CX-___; and Employer/Carrier Exhibits: EX-___.

Post-hearing briefs were filed by Claimant and Employer/Carrier on December 2 and 6, 2002, respectively. Based upon the evidence introduced, my observations of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

I. STIPULATIONS

Based upon the record, the prior Decision and Order, the original stipulations by the parties, and the Supplemental Order, I find:

1. The Act applies to this claim.

2. Claimant and Employer were in an employee-employer relationship at all relevant times.

3. Claimant was injured on October 26, 1992.

4. Medical benefits have been paid pursuant to Section 7 of the Act.

II. ISSUES

The unresolved issues presented by the parties are:

1. Whether Claimant filed a request for modification under Section 22 of the Act.

2. Whether Claimant's alleged request for modification under Section 22 of the Act is timely.

3. Whether a July 28, 1998 automobile accident constitutes an intervening event which terminates Employer/Carrier's liability for Claimant's present medical condition.

4. Whether Claimant's pain treatment and management from 1993 until 1996 was a result of Claimant's compensable injury.

5. Whether Claimant suffers a recurring hernia or a stretched hernia in addition to scar tissue which resulted from surgery for Claimant's compensable injury.

6. Whether Claimant is entitled to total disability benefits from June 8, 1993 to present and continuing.

7. Whether Claimant is entitled to a change of physicians.

8. Attorney's fees, penalties and interest.

III. STATEMENT OF THE CASE

The Testimonial Evidence

Claimant

Claimant discussed his medical treatment prior to 1999. He estimated his pain after his first hernia surgery in 1993 was "seven to eight" of a possible ten, with ten representing the highest amount of pain. (Tr. 77). Within "a month or two" after Dr. Richardson performed a procedure with Claimant's nerve to alleviate pain, Claimant estimated his pain diminished to about "three or four." The pain increased to "six [to] eight ... about eight months" later. (Tr. 77-78).

After treating with Dr. Richardson, Claimant continued treating with Dr. Nossaman at Tulane Hospital. In 1993, another physician, Dr. Owens, referred Claimant to the Gulf Coast Pain Clinic, where he treated with Dr. Lew. He estimated his pain remained about "six [to] eight" while treating with Dr. Lew. (Tr. 78-79).

After "a gap of five years," Claimant returned to Dr. Lew on October 9, 1998 after sustaining an injury in an automobile accident. From the time after his original surgery when his pain returned to "six to eight" until "right before the automobile accident," Claimant pain remained "six [to] eight." When he was asked whether he suffered an injury to his hernia in the automobile accident, Claimant responded, "I believe I did. I hurt it worse. It [the pain] went to about eight, nine." Likewise, Claimant recalled that he was told by a doctor that the 1998 automobile accident aggravated his left flank hernia condition. (Tr. 78-79, 82).

According to Claimant, activities of daily life increase his pain. Walking, driving, laying down, carrying groceries, cutting grass all cause him to suffer an increased amount of pain; however, none of these painful activities caused Claimant the same amount of increase in pain as the 1998 automobile accident. (Tr. 83-84).

Claimant underwent surgery with Dr. LeBlanc in April 2000. Before the surgery, injections provided by Dr. Lew reduced Claimant's pain to an estimated "three or four," but the result lasted "maybe eight to ten days," after which the pain returned

to its previous level. After the April 2000 surgery, Claimant's pain was temporarily ameliorated. When his level of pain returned to an estimated "six or seven," Claimant resumed treatment with Dr. Lew, who continued providing temporary relief by administering injections. (Tr. 84-86).

Claimant stated he has never been totally pain-free in his left side since the 1993 surgery. He takes a variety of medications for sleep and pain. No medical treatment he received has totally relieved his pain. (Tr. 87).

Although he was found totally disabled by Social Security, Claimant believes he could return to work but for his hernia condition. For instance, he believes he could be a greeter at Wal Mart under a trial work program under Social Security, but the necessary standing and physical activity would be too painful as a result of his hernia. Further, Claimant's pain medicine causes drowsiness and reduces his reflexes such that he does not drive. (Tr. 87-90).

On April 23, 2002, Claimant "found out" from Dr. LeBlanc that he suffered another hernia; however, Claimant attributed his pain to his original hernia because a bulge on his side grew and the pain increased over time. He "figured the hernia opened up again, because it was the same pain I went through in '92." (Tr. 93).

On cross-examination, Claimant admitted that he is on Social Security disability because of his "heart and lungs," which preclude him from performing his former occupation. He underwent heart surgery and takes blood pressure medication. He is undergoing treatment for chronic obstructive pulmonary disease every six months. For his lung condition, he takes Singulair and uses a nebulizer. Claimant suffers from sleep apnea, which forces him to sleep on his side. (Tr. 94-95).

Claimant acknowledged the 1998 automobile accident, but denied that the truck in which he was a passenger "rolled over." Rather, "somebody just found me off the side of the road, laying off the side of the road in a little ditch." Claimant agreed that the accident was "significant," causing him to seek medical treatment and to reach "a little settlement" agreement in the amount of $7,000.00 plus medical expenses, including Dr. Lew's services.[2] After the accident, his hernia was worse and more painful than before the accident. Claimant admitted that he

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[2] Claimant is not seeking reimbursement for medical expenses incurred with the automobile accident. (Tr. 99).

never told Drs. Ostrowe or LeBlanc that he sustained injuries in the 1998 automobile accident. (Tr. 96-100).

On redirect examination, Claimant stated he told Employer/Carrier about the accident before the original 1999 hearing. At that time, Claimant recalled no doctors telling him that his automobile accident was related to or aggravated his hernia; however, he remembered being told that the automobile accident injured his back. (Tr. 100-103).

On recross-examination, Claimant admitted that he testified in a February 2002 deposition that his automobile accident was "a little bump and a scratch, four or five years ago, but it wasn't nothing serious. It had nothing to do with my left side. I was a passenger. They hit us on the ... right back fender. It had nothing to do with the side. That was the seatbelt." (Tr. 104-105).

Mrs. Mildred Croson Ducote

Mrs. Ducote has been married to Claimant for 32 years, including during the time in which Claimant suffered his job-injury and sought medical treatment. Claimant's original surgery was performed by Dr. Steinberg at Tulane Hospital. Claimant continued medical treatment at Tulane Hospital, where he saw Dr. Dinh, a "nerve specialist," and Dr. Richardson, who performed surgery on Claimant's left side. (Tr. 47-49).

According to Mrs. Ducote, Claimant had problems with pain in his left side after the procedures of Drs. Dinh and Richardson. At home, Claimant would sit on the floor, leaning on a couch to relieve his pain. The only relief Claimant received was from injections which were provided by Drs. Lew and Aldrete and lasted "maybe a week or a few days." (Tr. 49-51).

Mrs. Ducote located Dr. LeBlanc through her own research and arranged an appointment for May 11, 2001. (Tr. 51-52). Before Dr. LeBlanc would perform surgery, Claimant "was required to seek post-op evaluations by other physicians," including a lung specialist and cardiologist, who eventually "cleared" him for surgery. Mrs. Ducote could not recall whether Dr. LeBlanc stated that he found another hernia, but remembered Dr. LeBlanc telling her that Claimant's condition was a recurrence of the original hernia. (Tr. 56-60).

Dr. LeBlanc performed surgery that was paid for by Mrs. Ducote's insurance carrier, which was disputing the payment. After the surgery, Claimant's pain was "a little relieved and it lasted a while," until it "started again." Claimant returned to

Dr. Lew for pain management. He also returned to Dr. LeBlanc for X-rays, which revealed "fluid around that hernia. And once that goes, the pain should be relieved some, but they're not sure." (Tr. 61-62).

Mrs. Ducote and Claimant incurred out-of-pocket expenses associated with Claimant's medical treatment with Drs. Lew, Ostrowe and LeBlanc, including a $250.00 deductible and other amounts associated with her co-pay arrangement with her insurer. No mileage was reimbursed regarding treatment with Drs. Lew, Ostrowe, and LeBlanc. (Tr. 62-64).

Over the last ten years, Mrs. Ducote observed Claimant unable to perform physical tasks around the house. Because of Claimant's pain, Mrs. Ducote cuts the grass, puts out the garbage, moves things, carries heavy things, including "really heavy physical, or medium physical," while Claimant "basically sits on the floor by the couch, watching TV." (Tr 64-67). Because of the effects of Claimant's pain medications, Mrs. Ducote prefers he not operate an automobile. Claimant's only driving restriction was against driving after injections. (Tr. 67-73).

On cross-examination, Mrs. Ducote admitted Claimant was given "serious diagnoses" about his heart and lung conditions. She acknowledged that Social Security determined Claimant was eligible for disability benefits because of his heart and lung conditions. (Tr. 74-75).

The Medical Evidence

Dr. Karl A. LeBlanc, M.D.

On July 15, 2002, Dr. LeBlanc was deposed by the parties. (EX-1). He is Board-certified in general surgery and quality assurance and utilization review. He has practiced as a surgeon for 19 years. He is a past president of the American Hernia Society and was the first physician ever to publish materials regarding the type of operation performed on Claimant. He has published "at least 10 to 15 articles and 5 to 10 book chapters on hernia repair. He is currently working on three books on hernias and laparoscopic surgery. (EX-1, pp. 5-7).

On May 11, 2001, Dr. LeBlanc first treated Claimant, who presented with a history of a 1992 job injury and subsequent medical treatment, including a laparoscopic examination and an open hernia repair in 1993. Claimant's medical record indicated the March 1993 hernia repair was successful. Dr. LeBlanc observed an incision "roughly about ... five to eight

centimeters" below his rib margin, and about 10 to 15 centimeters above his navel, "which is not a groin hernia." He also observed a bulge "approximately eight centimeters" above the incision, and noted "tenderness at the rib margin in that area."[3] (EX-1, pp. 7-14).

According to Dr. LeBlanc, a hernia is a defect in fascia, a tissue covering the muscle, regardless of its location on an abdominal wall. An inguinal hernia occurs in the lower groin, while a flank hernia occurs elsewhere in the body. The typical causes for hernias, such as the one from which Claimant suffers, include some type of incision such as "an anterior approach to the lumbar spine" or some injury involving "a lot of force," such as a "motorcycle handlebar ... or bicycle [injury]." (EX-1, pp. 12-14).

Dr. LeBlanc ordered a CAT scan and an MRI which revealed no abnormality. Such a finding does not preclude a diagnosis of hernia, because false negatives and positives may occur. With Claimant's history of an incision to the fascia of the abdominal wall and the particular method of medical repair, Dr. LeBlanc diagnosed recurrent flank hernia. According to Dr. LeBlanc, "[A]t the point I saw him, I cannot go backwards and say that there never was a hernia there at the time. I would have to go by the diagnosis that was made originally for the procedure he had." Thus, the surgery itself created a defect in the fascia, resulting in a chance for recurrence. (EX-1, pp. 14-16).

Dr. LeBlanc deferred to the opinion of a pain management specialist, Dr. Ostrowe, before he would recommend surgery to correct Claimant's condition. Dr. LeBlanc was never sure that another operation would eliminate Claimant's pain. (EX-1, pp. 16-18).

Considering the original June 1993 date of maximum medical improvement, when Claimant was found to be "cured, so to speak," Dr. LeBlanc indicated that "most hernias that recur, statistically will recur within a six-month period." Based on his experience and the nature of Claimant's history of medical treatment, "[Y]ou have to wait at least three years before you can definitively say the chance for recurrence has been minimized. As many as 75 to 80 percent of all recurrences ... will be noted within three years." (EX-1, pp. 18-20).

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[3] Dr. LeBlanc noted that it was not unusual to find a hernia located above the site of previous surgery. (EX-1, p. 27).

According to Dr. LeBlanc, Claimant had a "complex history," and "the reason that I went through an MRI and sent [Claimant] to Dr. Ostrowe is the fact that I was not then, and I am not now certain that the hernia had anything to do with Claimant's pain." Dr. LeBlanc explained that he doubted the effectiveness of hernia surgery to alleviate Claimant's pain. The percentage of hernia patients whose pain can be cured is "small. Because ... true pain is not that common with a hernia." Thus, he opined that the likelihood of success regarding Claimant's hernia surgery was "small," but "the larger percentage is that the source of pain was not the hernia, and I don't think long-term that that would eliminate the pain." He added that he continues to "wonder if the pain is not related to Claimant's hernia and related to something else as a source. And I think that's very high." He concluded, "the statistical probability of [Claimant's] pain being related to his hernia is low." (EX-1, pp. 20-24).

When asked whether he believed Claimant's surgery was necessary, Dr. LeBlanc replied the surgery was elective:

> The type of hernia he had being broad-based was an exordinant [sic.] low probability of having any major complications like strangulation or herniation....[4]
>
> And in fact, because of his high risk medically, I was reluctant to actually fix the hernia. The patient was absolutely convinced that this would stop his pain. And under that guise, I can only offer advice and counsel patients, and they have to make the ultimate decision of whether or not to proceed with the operation.
>
> As I stated, I was not sure that that would actually help. He wanted it done.

(EX-1, p. 25; CX-28, pp. 1, 9; CX-33b).

Dr. LeBlanc testified that he performed laparoscopic incisional repair on Claimant, into whom a material called Dualmesh was inserted to repair the defect. He did not find anything unusual about Claimant's anatomy that would "place him apart from other patients" he typically sees. Claimant's scar tissue associated with his original surgery was "not at all unusual." Claimant returned after the surgery, complaining of

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[4] Strangulation or herniation refers to the "very, very painful" process involving intra-abdominal contents passing through the defect causing compression. (EX-1, pp. 25-26).

only pain. The "previous noted bulge was absent." Some redness over his suture site was present, which completely healed. (EX-1, pp. 27-29).

On July 9, 2002, Claimant returned with swelling at the site of the hernia. Dr. LeBlanc diagnosed a seroma, or "a fluid collection above the patch" where the mesh was placed. Seromas occur in "nearly 100 percent of these patients," and Dr. LeBlanc does not consider them a "true complication" from surgery. The condition is "almost uniformly" ignored, and the body absorbs the fluid. Dr. LeBlanc expected Claimant's seroma to resolve within three to six months after the surgery. Dr. LeBlanc tells all of his patients that they may return to their previous level of activity "whenever they feel able. And I usually see them one week after surgery and I tell them that then." According to Dr. LeBlanc, there is no medical necessity for Claimant to seek follow-up treatment. (EX-1, pp. 30-34).

On cross-examination, Dr. LeBlanc recalled a post-operative visit which indicated Claimant's flank hernia diminished. He diagnosed a recurring or stretched hernia after Claimant's April 23, 2002 surgery, when he removed scar tissue during the hernia repair. Scar tissue may contribute to pain. When "any incision" heals, abnormal nerve regeneration called neuromas may occur and cause pain. Dr. LeBlanc removed scar tissue, which he was "obligated to repair" because it would prevent the adequate repair of Claimant's hernia. Dr. LeBlanc was unsure whether it was in Claimant's best interest to have the April 23, 2002 surgery. Claimant returned three times after his April 2002 surgery and reported a decrease in pain. (EX-1, pp. 34-41).

Although Dr. LeBlanc deferred to Dr. Ostrowe for pain management and treatment, his experience is that "patients that present with truly painful hernias that are not strangulated or incarcerated, it is more likely than not that the hernia is not the source of pain." (EX-1, pp. 36-39).

Dr. LeBlanc opined that Claimant's lung problems could contribute to the redevelopment of his hernia because difficulty breathing and coughing increases abdominal pressures, thereby causing tension on the hernia repair which results in a recurrence. Likewise, Claimant's obesity may also increase abdominal pressures, which "predisposes him to redevelopment of a hernia." Claimant's scar tissue would not aggravate a hernia condition, but could cause pain. Without Claimant's lung and weight conditions, his chance for a recurrent hernia is "probably 10 to 25 percent." With the lung and weight conditions, the likelihood of recurrence "jumps to 25 to 50 percent." (EX-1, pp. 39-47).

Dr. Alan Ostrowe, M.D.

Dr. Ostrowe was deposed by the parties on July 18, 2002. (EX-2). He specializes in anesthesiology and has a sub-specialty in pain management. (EX-2, pp. 6-7).

Dr. LeBlanc referred Claimant to Dr. Ostrowe for a nerve block on December 17, 2001. At that time, Claimant presented with pain in his left flank and a history of left flank pain because of a post-incisional hernia which Claimant attributed to an injury aboard a ship. "He had multiple procedures to repair a hernia . . . [and] to diminish or relieve him of pain that he had in his flank." (EX-2, pp. 8-9; CX-34b, p. 4).

Upon examination, Dr. Ostrowe found a sterile scar, secondary to bypass surgery, "very distant breath sounds" associated with Claimant's problems breathing. Based on Claimant's history, and "having no further information from Dr. LeBlanc, Claimant appeared to have undergone a neurectomy to decrease the pain on the left side. Claimant appeared to have pain secondary to occurrences on the chest wall. Dr. Ostrowe conferred with no physicians other than Dr. LeBlanc regarding Claimant's condition. (EX-2, pp. 10-11).

Dr. Ostrowe performed a fluoroscopic guided selective nerve root block around the area of Claimant's pain at the T8, T9 and T10 levels. The process involves placing an anesthetic on a particular nerve path in the area of Claimant's pain. Identifying the area at which the anesthetic is provided is a precise process rather than an educated guess. After the root block was performed, Claimant was unable to replicate his pain by various body movements. Claimant "left that session pain-free. (EX-2, pp. 11-15).

Dr. Ostrowe did not determine the source of Claimant's pain along the nerve because "the goal of this therapy was to stop pain . . . ." He diagnosed neurogenic pain secondary to nerve injury. The most common clinical reason for Claimant's injured nerve was "probably as a result of surgery or injury in the area, especially into the scar." Sometimes, a neuroma, or an attempt by the body to repair the damaged nerve, occurs which creates pain. "So just the fact that the nerve block was done more proximal to the central nerve than distal ... [has no] bearing on what we are trying to do." (EX-2, pp. 19-21).

Claimant reported "approximately five days worth of relief of his pain with a slow increase in the amount of pain after the fifth day until full recurrence of his pain." On January 7,

2002, the root block procedure was repeated at the same levels; however, the effectiveness of the procedure was unknown because Claimant was "lost to follow-up." (EX-2, pp. 21-25; CX-34B, p. 3).

Dr. Ostrowe was aware that Claimant underwent surgery on April 23, 2002, and he would defer to Dr. LeBlanc's opinion regarding whether or not that surgery was a success. (EX-2, pp. 23-26). Regarding whether Claimant's pain significantly decreased after his April 23, 2002 surgery, Dr. Ostrowe concluded that Claimant would not need to return to him if he were no longer in pain.[5] (EX-2, p. 37).

Dr. Ostrowe could not opine with a degree of medical probability whether Claimant's hernia precluded his return to work in any fashion; however, Claimant's other conditions involving chronic obstructive pulmonary disease and open-heart surgery were significant enough for Claimant to be partially disabled. (EX-2, pp. 27-28).

On cross-examination, Dr. Ostrowe stated that the nerve path which was anesthetized would have been involved in the surgical scar tissue from the flank hernia operation previously performed. (EX-2, p.32). However, the nerve that reacted to his injections "wasn't the same nerve" as the nerve involved in Claimant's scar tissue. He assumed, based on his knowledge of surgeries and their aftermath, "that there were nerves cut and probable neuroma formation over those nerves." (EX-2, pp. 33-34).

Dr. Edward Staudinger, M.D.

On July 29, 2002, the parties deposed Dr. Staudinger, who is board-certified in surgery, and whose field of practice includes the care and treatment of hernias. (EX-3, pp. 5-6). On April 12, 2002, he examined Claimant at the request of Employer/Carrier, who requested a second opinion regarding surgery. (EX-3, p. 25).

Claimant presented with a "long history of a left flank hernia, which was initially repaired in 1993 and has had pain since then." The most common cause for a flank hernia is a previous incision, but it is possible that it can occur from some significant trauma to the area. (EX-3, pp. 9-10). Flank hernias

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[5] A January 10, 2002 report of a vocational expert indicates Claimant discussed injections given by Drs. Lew and Ostrowe and preferred Dr. Ostrowe's treatment to that of Dr. Lew, whose treatment Claimant decided to forego. (CX-28, p. 3).

are “very rare,” and Dr. Staudinger estimates he operated on ten flank hernias over his seventeen years in private practice.” (EX-3, p. 26).

Physical examination revealed an “overweight white male in no acute distress.” There was a slight bulge in Claimant’s side above a scar on the left flank. Tenderness was noted in that area, but no palpable effect was observed. A preliminary diagnosis included “a bowing or distension of the tissue without a true defect or hole.” Such a bowing or distension occurs in “somebody that’s had a previous operation in that area, or somebody that’s overweight or expanded their waistline, the tissues can lose some of their tensile strength . . . .” Thus, the bulge is not a “true hole or defect where abdominal contents are poking through.” (EX-3, pp. 11-12).

Dr. Staudinger explained that strangulation, or compromised blood flow to the herniated tissue, causes severe pain and is the usual cause of symptoms related to a hernia. Dr Staudinger reviewed Dr. LeBlanc’s operative report, which indicated no strangulation, a “significant medical finding” that would ordinarily be reported in the operative report. (EX-3, pp. 12-16).

When Dr. Staudinger examined Claimant, he was “doubtful that his complaints of this left flank hernia were causing the pain he was having.” Likewise, he was “doubtful that a surgical procedure was going to help or cure his symptoms.” (EX-3, pp. 16-17).

According to Dr. Staudinger, history of an automobile accident, as reported to Dr. Lew, would be “significant medical history.” If Claimant’s pain did not change after the automobile accident, then the accident probably did not cause any problems and probably would not be related to his flank pain. If Claimant was not having a lot of flank pain prior to the accident but then experienced more pain after the accident, “then you’ve got to assume that the accident contributed [to] it.” (EX-3, pp. 19-21).

Dr. Christopher Y. Lew, M.D.

On August 5, 2002, Dr. Lew was deposed by the parties. (CX-35). He is a licensed medical practitioner who specializes in pain management.

On October 9, 1998, Dr. Lew first treated Claimant, who was referred to Dr. Lew for evaluation and treatment by his surgeon, Dr. Urluch. Claimant reported pain in his left side or his

chest, which "began on July 28, 1998, when he was in a motor vehicle accident." On a "patient intake form," Claimant specifically noted that he was visiting Dr. Lew for left-sided pain brought about by an automobile accident. He was riding in a pickup truck that was struck and then rolled. He suffered no fracture, dislocation, or laceration, but reported "pain in his left side ever since that accident." His pain was described as "constant, increased with movement, [and] relieved by rest." Imaging reportedly revealed a recurrent abdominal hernia, which was not repaired due to prior operations "for the same condition" that resulted in a post-operative nerve injury treated by Dr. Richards at Tulane Hospital. (CX-35, p. 4).

Upon examination of Claimant, Dr. Lew found "diffused tenderness," or a wide area of tenderness, from Claimant's upper abdomen to the lower chest extending to the back." He also reported tenderness over Claimant's left thoracic back and a scar in the midline over the thoracic spine, which he attributed to Dr. Richardson's procedure. He found some loss of sensation about Claimant's abdominal surgical scar, but no "long tract" signs that would indicate damage to the spinal cord. (CX-35, pp. 4-5).

Dr. Lew diagnosed "left thoracic radicular and neuropathic pain of an abdominal hernia, . . . coronary artery disease, and emphysema." He prescribed an antidepressant helpful for nerve pain, Tylenol with codeine, and intercostal nerve blocks, or injections of local anesthetics mixed with anti-inflammatory steroids. According to Dr. Lew, Claimant's "injuries and his complaints are consistent with a motor vehicle accident." Id.

On October 21, 1998, Dr. Lew followed-up with Claimant, who reported temporary relief with his first intercostal injection. Claimant was not considered a candidate for surgery because of his pain, which was severe enough that he could not remain still long enough to perform an MRI. Dr. Lew diagnosed "left thoracic neuralgia, which means nerve pain in the thoracic area." (CX-35, p. 5).

Dr. Lew did not identify any particular nerve associated with the injection, which was administered as "more of a therapeutic trial" for the relief of pain. The injection was not a "diagnostic injection, because there are multiple causes for improvement from injections, including a placebo response. Dr. Lew was unable to determine whether Claimant's relief was "a placebo effect taken here, or whether it was absorbed by some other body tissue, or whether there was a direct hit on the nerve that is responsible for the pain." Id.

Dr. Lew discussed an "osteophyte found by [an October 1999] MRI." It was on the same side and the same lower thoracic area as Claimant's pain. According to Dr. Lew, "It is possible that that could have been contributing to some of his pain." It was likewise possible that an automobile accident may have aggravated the pre-existing osteophyte. (CX-35, pp. 9-10).

On December 17, 1999, Dr. Lew treated Claimant again, although Claimant was originally scheduled for a follow-up visit on December 9, 1998. No reason for such a delay in follow-up treatment was provided in Dr. Lew's records. Claimant reported a history of "having a four-month recurrence of the chronically recurring pain in his left flank." The pain was constant, but increased with movement. Surgical evaluation disclosed "no evidence of hernia." A CAT scan was negative, and a colonoscopy revealed a polyp. Tenderness was reported in the same areas as were reported during Claimant's previous visits. Dr. Lew diagnosed thoracic radiculopathy and thoracic visceral pain. He did not attribute any particular cause for the pain. (CX-35, pp. 5-7).

After December 17, 1999, Dr. Lew provided injections on a number of visits. Although Dr. Lew's records do not indicate whether the injections were effective, Dr. Lew stated that there would have been "little point in continuing to do them" if they were ineffective. Likewise, if the pain went away, "there is not a need to do the injection. If there is some benefit, but recurrent or residual pain, there would be a reason to do injections repeatedly." (CX-35, p. 8).

On January 12, 2000, Dr. Lew prescribed a TENS unit, an electrical device that can be helpful for pain, and Soma for muscle spasm. On February 8, 2000, Dr. Lew discontinued the TENS unit, which was ineffective, but continued Soma. On February 22, 2000, Claimant reported that injections were "lasting about two weeks." Thereafter, Claimant continued to report temporary relief from the injections, which Dr. Lew opined were "not going to be curative, [but] were only going to [be] palliative or supportive in nature." Dr. Lew continued administering injections on "almost every visit," except for one involving Claimant's use of alcohol, which might adversely interact with the injections. (CX-35, pp. 8-9, 11).

On June 8, 2000, Claimant reported that he was diagnosed with an "incisional hernia in the left flank, [and] he would have that surgically repaired." Dr. Lew continued injections which were of "some benefit." Dr. Lew never palpated or discerned a hernia, but that is not his area of expertise; however, he would

be competent to palpate a hernia if it were "obvious". (CX-36, p. 10).

By November 28, 2000, Dr. Lew recommended Claimant to Dr. Boutte, a pain psychologist, when Claimant's condition did not improve. "Almost eleven months" passed until Dr. Lew treated Claimant again. During that time, Claimant treated with Drs. Kleggett in New Orleans and Ostrowe in Baton Rouge. He was prescribed Oxycontin, which he discontinued "about two months" prior to his return to Dr. Lew. Dr. Ostrowe provided thoracic spinal blocks which provided no greater degree of relief than the intercostal nerve blocks. Upon Claimant's return, he reported continuing pain in his left chest and abdomen which increased when he was in an upright position with physical activity. His complaints of pain were consistent with the same complaints he previously reported. (CX-35, pp. 10-12).

On June 24, 2002, Dr. Lew last treated Claimant, according to his records; however, Claimant may have visited him in July 2002, when he was scheduled for a follow-up. Claimant reported that he underwent surgery for his hernia, but the surgery did not provide lasting pain relief. Claimant's complaints of pain were "essentially the same complaints that he had before the surgery." Dr. Lew again administered intercostal injections. Claimant was scheduled to return in the future. (CX-35, pp. 13-14).

According to Dr. Lew, Claimant underwent a hernialaparotomy with Dr. Steinberg for a left flank hernia on March 16, 1993. Since then, based on Claimant's history, Dr. Lew opined that it is "consistent that something happened at the time of [Claimant's automobile] accident, and that he is having recurrent symptoms." Dr. Lew testified that, during the course of his treatment of Claimant, he provided "the same type of treatment, the injections are the same." Likewise, he stated Claimant's complaints were "essentially the same throughout the time [he] treated him." Dr. Lew would defer to surgeons for an opinion on "whether or not there was an existence of a hernia or the causation of the hernia." All of Dr. Lew's diagnoses and medical findings were based on a reasonable degree of medical probability. (CX-35, pp. 15-16).

On cross-examination, Dr. Lew indicated Claimant's September 19 and November 28, 2000 treatments were being performed for "thoracic neuralgia of pain due to the effect of an abdominal wall hernia" and "chest wall pain due to incisional hernia." According to Dr. Lew, the two visits and the two indications were "essentially the same thing." Dr. Lew opined Claimant has pain in that area "due to nerve damage, possibly aggravated by the recurrence of the hernia, and he has been having the pain for a

long time." Dr. Lew concluded Claimant's nerve damage was caused by the initial hernia repair because "I had gotten a note to that effect at some point." (CX-35, pp. 16-19; EX-4, p. 75).

While it is impossible to definitively say what causes Claimant's pain in his chest wall, Dr. Lew stated, "Whether or not a motor vehicle accident may have contributed, [Claimant] did have an aggravation of his pain in 1998 following that accident. And that is what we know. Beyond that, I don't want to speculate." He added, "Given a long . . . symptom-free interval between 1993 and 1998, the incident in 1998, the accident, is the most dramatic thing to explain the recurrence in [Claimant's] symptoms." (CX-35, pp. 19-20). Even if Claimant were not symptom-free from 1993 until 1998, Dr. Lew stated, "I don't see how we can ignore injuries suffered with the accident and the increase in symptoms." (CX-35, p. 21).

Tulane University Medical Center Records

Claimant sought treatment with Tulane University Medical Center on a number of occasions after his compensable injury through 1996. (CX-31). On July 8, 1993, Claimant visited the hospital with persistent left flank pain at T11 to T12. (CX-31, p. 58). On August 5, 1993, Claimant was referred to a physician for nerve blocks at his left-sided T11 to T12 for intercostal neuralgia. (CX-31, p. 55).

On August 26, 1993, Claimant returned with flank pain that radiated to his left shoulder. The pain at times radiated into his chest, and increased with sitting for long periods, coughing and breathing. He reported optimal relief from nerve blocks. He reported "even more pain relief" after Dr. Steinberg performed surgery to repair his hernia. (CX-31, p. 57). On September 9, 1993, Claimant returned with left flank pain, estimated at six out of ten. Claimant did not associate his pain with his abdominal adhesions. (CX-31, p. 54).

Claimant continued to return, complaining of left-sided pain that was temporarily improved by nerve blocks. On September 27, 1993, Claimant reported a worsening of pain symptoms associated with "physical overactivity," when he walked a distance greater than one mile. (CX-31, p. 50). On September 30, 1993, however, Claimant reported he was in no pain, estimating it at zero out of ten. He was pain-free for one week. (CX-31, p. 49).

On October 7, 1993, Claimant returned with left flank pain estimated at two out of five. Intercostal nerve blocks were prescribed at T11. (CX-31, p. 48). Likewise, Claimant returned

on October 14, 1993 with complaints of left flank pain for which intercostal nerve blocks were prescribed. (CX-31, p. 46).

On November 10 and 11, 1993, Claimant reported left-sided flank pain that "starts to pulsate then radiates to shoulder blade bottom and hips." His pain was estimated at two out of five. The previous week, he underwent a procedure that resulted in no pain for two days. The pain gradually returned to its previous level. On November 18, 1993, Claimant returned with persistent left flank pain. He "has been undergoing repeated T-11 intercostal block." He received cryoanesthesia at T11 on his left side. (CX-31, pp. 41-42).

On February 8, 1994, Claimant presented with left flank burning and pulsating pain which began "2 weeks ago." Tenderness to palpation was reported "8-10 cm from midline inferior to the 12th rib." The pain began in the left posterior low thoracic area with radiation to the left scapula. (CX-31, p. 37). On February 17, 1994, Claimant reported left flank pain estimated at three out of five. He was noted as post-intercostal block, which eased his pain temporarily. (CX-31, p. 36).

On February 22, 1994, Claimant presented with complaints of pain estimated at two out of five. He reported an increase in pain to five out of five after an intercostal block provided "95 percent relief" from previous pain which he experienced. Upon evaluation, Claimant's pain was reported as unchanged from previous visits. Short-term relief from an intercostal block was reported. A 60-second "cryo probe to area of pain" was the reported procedure. Claimant was to return for "post-cryo" evaluation. (CX-31, p. 35).

On May 24, 1994, Claimant complained of pain in his left flank, estimated as two out of five. The pain "started two weeks ago" with a "burning feeling then about 4-5 days ago, the burning feeling changed to [sharp] pain." He noticed that standing or sitting in certain postures caused an increase in pain, as did coughing and sneezing. (CX-31, p. 33). On May 31, 1994, a physician's progress notes indicate Claimant complained of pain in his left flank, estimated as three out of five. (CX-31, p. 32).

On June 16, 1994, although Claimant scheduled a June 30, 1994 appointment with Dr. Dinh, Claimant called Tulane Hospital, complaining of pain and needing more medication. On November 7, 1995, Dr. Dzung H. Dinh, M.D., treated Claimant for severe T11/T12 pain which was reported as "quite constant" since he was treated for intercostal neuralgia in 1993. Dr. Dinh referred Claimant to Dr. Richardson, an expert in pain procedure for a

definitive operation for his intracostal neuralgia. (CX-31, pp. 28-29). On November 20, 1995, Claimant complained of persistent pain in the area of T-12 on the left side. (CX-31, p. 27).

On January 18, 1996, Claimant treated with Dr. Donald Richardson, M.D., for flank pain that radiated into his groin when he coughs, sneezes, yawns, sits up, or lays down. The pain was "very persistent" in the distribution of his hernia scar." Claimant was diagnosed with "left flank pain secondary to incisional hernia and repair." A dorsal rhizotomy was performed at the T11 and T12 distribution, and he reported "much less flank pain." He was discharged on January 22, 1996 in good condition with instructions to engage in activities "as tolerated." (CX-31, pp. 2-4, 11, 24). On March 13, 1996, a hand-written entry on a physician's progress note indicates Claimant complained that he still had pain sitting or standing. (CX-31, p. 26).

Claimant sought various medical treatment after May 24, 2000. (CX-32). On May 24, 2000, Claimant was treated by Dr. Mary Jo Wright, M.D., who reported Claimant's emphysema, smoking history, and hypertension. Claimant was seeking treatment for an increase in left-sided pain over a prior incision site for a left-sided flank hernia. A "possible small hernia at the upper-most portion of his incision" was noted. CT scans of the abdomen and pelvis revealed no identifiable mass. There was "no evidence of hernia nor mass." (CX-32, pp. 1-5).

On May 29, 2000, Claimant was referred for pre-operative evaluation by Dr. Kevin L. Kovitz, M.D., for a left flank abdominal hernia repair. He was diagnosed with hypertension, severe coronary artery disease, severe chronic obstructive pulmonary disease, and left flank abdominal hernia. (CX-32, pp. 6-7). On June 6, 2000, Dr. Kovitz recommended further evaluation of Claimant's health conditions to determine the risk of operative treatment. (CX-32, pp. 19-21).

In an undated report, Claimant treated with Dr. Eric R. Ehlenberger, M.D., for shortness of breath after air conditioning was shut off at a hotel. He was diagnosed with chronic obstructive pulmonary disease with mild alcohol intoxification. He showed "good improvement" with treatment, but was not immediately allowed to return home. (CX-32, pp. 16-17). On June 13, 2000, Claimant returned for follow-up evaluation. Dr. Kovitz determined Claimant was an increased surgery risk, based on his sleep apnea and chronic obstructive pulmonary disease. (CX-32, pp. 26-27).

Contentions of the Parties

Claimant alleges modification is appropriate because of a mistake of fact regarding medical records based on which the prior Decision and Order was rendered. Specifically, Claimant argues that he recently discovered medical records which were not submitted for consideration at the March 24, 1999 formal hearing. Because of the incompleteness of the original record, Claimant asserts that an incorrect conclusion was reached regarding his pain management and its relatedness to his compensable injury. He also alleges that the newly submitted medical evidence establishes that he is entitled to total disability benefits from June 8, 1993 to present and continuing.

Claimant asserts his modification request is timely because the time for filing a modification request was interrupted by pleadings and correspondence filed with the District Director and with this office. He asserts Employer/Carrier are precluded from pursuing their defense of timeliness because of the June 11, 2002 Supplemental Decision and Order allowing Claimant to pursue his claim for modification. Claimant further argues his modification request is timely because the request for enforcement or appeal of an order is premature unless the order is a final decision.

Employer/Carrier argue that Claimant's modification request is untimely because all of the pleadings and legal actions taken by Claimant's former attorney were directed at seeking clarification and enforcement of Employer/Carrier's obligations under the original Decision and Order rather than raising new issues that are the subject of a modification under Section 22 of the Act. Employer/Carrier note that the last payment made by Employer was dated July 29, 1999. After that date, the first notice Employer/Carrier claim they received regarding any additional benefits Claimant sought was January 2001, at which time they filed an LS-207 indicating timeliness was an issue.

Notwithstanding the alleged defects in the timeliness of Claimant's modification request, Employer/Carrier argue Claimant failed to establish that his condition is causally related to any condition previously found to be compensable under the prior Decision and Order, due to a superceding and intervening automobile accident.

IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J. B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has

determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994), aff'g. 990 F.2d 730 (3rd Cir. 1993).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. Duhagon v. Metropolitan Stevedore Company, 31 BRBS 98, 101 (1997); Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 551 F.2d 898, 900 (5th Cir. 1981); Bank v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

Section 22 of the Act permits any party-in-interest to request modification of a compensation award for mistake of fact or change in physical or economic condition. See Metropolitan Stevedore Co. v. Rambo [Rambo I], 515 U.S. 291 (1995). The rationale for allowing modification of a previous compensation award is to render justice under the Act. Congress intended Section 22 modification to displace traditional notions of res judicata, and to allow the fact-finder, within the proper time frame after a final decision and order, to consider newly submitted evidence or to further reflect on the evidence initially submitted. Hudson v. Southwestern Barge Fleet Services, 16 BRBS 367 (1984).

The administrative law judge, as trier of fact, has broad discretion to modify a compensation order. O'Keefe v. Aerojet-General Shipyards, 404 U.S. 254, reh'g denied, 404 U.S. 1053 (1972). The administrative law judge has the authority to reopen the record and correct mistakes of fact whether demonstrated by wholly new evidence, cumulative evidence or merely further reflection on the evidence initially submitted. Id.

After the original hearing, the undersigned issued a July 2, 1999 Decision and Order finding that Claimant was temporarily totally disabled from October 16, 1992 until June 7, 1993 and that he reached maximum medical improvement from his work-related flank hernia condition on June 8, 1993. Claimant presently argues that the omission of certain medical records resulted in a

mistake of fact which warrants modification of the original Decision and Order.

A. Procedural Issues

1. Claimant's Motion to Strike Employer/Carrier's Issues and Exhibits

On October 30, 2002, Claimant filed a Motion to Strike Employer/Carrier's Issues and Exhibits and Memorandum in Support. He argues Employer/Carrier's Exhibits 7 (Employer/Carrier's LS-207), 8 (records of last date of compensation payment), and 9 (Employer/Carrier's LS-208) should be stricken along with Employer/Carrier's argument regarding defects in the timeliness of Claimant's motion for modification. Claimant asserts Employer/Carrier waived their timeliness argument at the Supplemental Hearing and in the Supplemental Order. He also argues that modification was proper under Section 22 of the Act because sufficient pleadings had been filed to preserve his claim for modification. He alternatively argues that modification under Section 22 of the Act was appropriate because the July 2, 1999 Decision and Order was not a final Order for the purposes of enforcement and appeal.

On November 1, 2002, Employer/Carrier were ordered to show cause why Claimant's motion should not be granted. They were directed to respond to Claimant's motion in their post-hearing brief.

On December 6, 2002, Employer/Carrier filed their post-hearing brief in which they assert that their exhibits and timeliness argument should not be stricken from the record. Employer/Carrier deny waiving any defenses to Claimant's claim for modification and assert that they raised the timeliness issue at the earliest opportunity. Employer/Carrier averred that a modification under Section 22 is barred by the one-year statute of limitations and all parties were given time to prepare arguments on the issue. Thus, Employer/Carrier argue the timeliness defense should be considered on the merits to protect the rights of all parties involved and to determine whether the undersigned has proper jurisdiction to issue a Decision and Order regarding new claims for benefits.

For the reasons and authority relied upon by Employer/Carrier in their Post-hearing brief, Claimant's motion is hereby **DENIED**. Consequently, EX-7, EX-8, and EX-9 are received into the record, and the merits of the timeliness issue will be addressed in this Decision and Order.

2. Whether Employer/Carrier Waived Their Defense to Timeliness Under Section 22 of the Act

Claimant argues that the issue of timeliness must be excluded from this Decision and Order because Employer/Carrier waived their defense of timeliness under Section 22 of the Act at the Supplemental hearing and in the June 11, 2002 Supplemental Decision and Order which allowed Claimant to pursue his claim for modification, relying on cases such as U.S.A. v. Retirement Services Group, 302 F.3d 425 (5th Cir. 2002)(the trial court may disregard stipulations between parties only if accepting them would be "manifestly unjust or if the evidence contrary to the stipulation was substantial"). Claimant argues:

> It would be manifestly unjust to hold the Claimant to all the terms of the Supplemental Order where he waived any and all actions at law against his Employer/Carrier; but at the same time allow the Employer/Carrier to now raise those defenses which there [sic] likewise waived.

I find Claimant's argument without merit.

According to Claimant, "Clearly the intent and the face of the Supplemental Order reflects that the Employer/Carrier (whose counsel prepared the supplemental order) [sic] waived any defense as to timeliness or form of Claimant's request for modification under Section 22 [of the Act]." The intent of the Supplemental Hearing was to resolve disputes over Employer/Carrier's obligations for Claimant's outstanding medical bills incurred prior to the July 2, 1999 Decision and Order despite Claimant's ongoing attempts to seek a Default Order and to enforce the July 2, 1999 Decision and Order in Federal Court. (Supp. Tr. 128-129). The Supplemental Order reflecting the parties' agreement provides that certain disputed medical charges

> are agreed by the parties to have been incurred as the result of the repair of the subject flank hernia and therefore will be paid by Employer/Carrier. No other charges will be asserted by Claimant to be compensable prior to the Order of Administrative Law Judge dated July 2, 1999.

(CX-39G, p. 3). The Supplemental Order also provided for fees and penalties to be assessed against Employer/Carrier, while Claimant agreed to forever dismiss and discharge Employer/Carrier from "any and all claims he may have or may have accrued under common law, equity or otherwise," in any court of law, administrative court or otherwise "at the time of the

Supplemental Hearing," including "any claims for default for the failure to pay any medical charges previously incurred by Claimant" prior to the July 2, 1999 Decision and Order. Thus, the Supplemental Order ended all disputes between the parties regarding the unpaid medical benefits incurred prior to the July 2, 1999 Decision and Order.

Consequently, the provision at the end of the Supplemental Order permitting Claimant to pursue his claims for modification and/or benefits under the Act regarding "future medical expenses occurring on or after [the July 2, 1999 Decision and Order]" indicates Claimant's remaining claims were beyond the parties' agreement concerning the previously unpaid medical benefits.

Moreover, the face of the Supplemental Order reflects no waiver by Employer/Carrier of any defense regarding Claimant's requests for additional benefits and/or modification under Section 22 of the Act. There is simply no language in the Supplemental Order which may be construed as a waiver by any party of any defense or issue under Section 22 of the Act.

Thus, there is no stipulation to disregard concerning whether the parties agreed that Employer/Carrier waived their timeliness defense under Section 22 of the Act. A finding otherwise would unduly burden Employer/Carrier and yield a conclusion that does not best ascertain the rights of the parties. See Burley v. Tidewater Temps Inc., 35 BRBS 185 (2002)(an administrative law judge is not bound by common law or statutory rules of evidence or by technical or formal rules of procedure, but should conduct the hearing in a manner that will best ascertain the rights of the parties)(citing 20 C.F.R. §702.339 and 33 U.S.C. § 923). Accordingly, I find Employer/Carrier are not precluded from arguing defects in the timeliness of Claimant's claim because of the language in the Supplemental Order.

Assuming **arguendo** that the language in the Supplemental Order could be considered a possible waiver of a defense, the record indicates no manifestation of any intent by Employer/Carrier to waive a timeliness defense under Section 22 of the Act at the time of the Supplemental Hearing or Order. See U.S.A., supra.

On January 16, 2001, Claimant simultaneously filed an Application for Default Pursuant to Section 18(a) of the Act with the District Director and an Amended Motion to Clarify and Application for Default Judgment Pursuant to Section 18(a) of the Act with this office. In his motion, Claimant sought an Order declaring Employer/Carrier in default of the prior Order and

"designating the amount of the default, including the amount of benefits, interest, penalties, and attorney fees due." (CX-36, p. 8). On January 23, 2001, Employer/Carrier filed an LS-207 controverting Claimant's right to compensation and asserting the defense of statute of limitations. (EX-7).

Employer/Carrier raised the timeliness defense in the Supplemental Hearing when Claimant raised the issue of default under Section 18(a) of the Act. (Supp. Tr. 37-38, 41-42, 128). Likewise, Employer/Carrier relied on the timeliness defense at the August 15, 2002 hearing on modification under Section 22 of the Act. Thus, even if the language in the Supplemental Order could be construed as a possible waiver, I find such a waiver would be manifestly unjust insofar as it allows Claimant to pursue his claim, but denies Employer/Carrier a defense which they promptly and persistently pursued throughout this matter.

Moreover, I find that the arguable waiver should be disregarded because substantial evidence to the contrary is provided in the record which indicates the purpose of the Supplemental Hearing and Order was to resolve existing unpaid medical bills associated with the previous Decision and Order rather than resolving future disputes concerning modification, which were delayed until a later date. Claimant's counsel specifically acknowledged that modification was "left open and was not an issue" at the Supplemental Hearing which resulted in the Supplemental Order. (Supp. Tr. 132). Accordingly, I would conclude the issue of timeliness under Section 22 of the Act was not contemplated by the arguable waiver.

Claimant further argues that the timeliness defense is waived under Section 13 of the Act because Employer/Carrier failed to object to the filing of the claim at "the first hearing of such a claim." This argument is specious and without merit. As noted above, Employer/Carrier raised the issue of timeliness at the April 5, 2002 Supplemental Hearing at which Claimant's counsel understood the issue of modification was deferred for consideration until a later date. At the August 15, 2002 hearing on modification, Employer/Carrier immediately argued the defense of timeliness. Prior to the hearing on modification, Employer/Carrier raised the issue of timeliness in its controversion and notified Claimant the issue would be raised at the hearing. Thus, I find Employer/Carrier did not waive their defense by allegedly failing to object to timeliness at "the first hearing of such a claim" for modification in which the parties were given reasonable notice and an opportunity to be heard under Section 13 of the Act.

Likewise, Claimant argues Employer/Carrier waived their defense because they failed to file an LS-18 in this matter. Claimant offers no authority for this argument. 20 C.F.R. § 702.318(e) provides that the undersigned may consider such intransigence to the extent relevant. Because Employer/Carrier promptly controverted Claimant's entitlement to benefits on the basis of timeliness, I am not persuaded that Employer/Carrier's intransigence regarding later LS-18s is significantly relevant.

Morever, because Employer/Carrier failed to file an LS-18 after a Pre-hearing Order directing the parties to file an LS-18, the undersigned may make certain inferences and rulings under 29 C.F.R. §18.6(d)(2) for the purpose of permitting resolution of the relevant issues and disposition of the proceeding without unnecessary delay despite the failure to comply. Under the present facts, Employer/Carrier's failure to file an LS-18 does not affect the resolution of the relevant issues and disposition of the matter, which may be made without unnecessary delay. Accordingly, I conclude Employer/Carrier's failure to file an LS-18 does not result in a waiver of their defenses.

Claimant is not unduly prejudiced, because Employer/Carrier filed their LS-207 controverting his claim on the basis of timeliness in January 2001. As discussed above, Employer/Carrier argued timeliness at the Supplemental Hearing, and Claimant was notified in advance of the hearing on modification that the issue of timeliness would be raised. Further, the parties were allowed generous time to file post-hearing briefs and to submit additional exhibits in support of their positions on the timeliness issue, and several extensions of time were granted. See Saunders v. Jumbo Food Stores, Inc., 16 BRBS 245 (1984)(issues not previously raised may be presented at a hearing as long as the parties are given time to prepare); Burley, supra; 20 C.F.R. § 702.336; 20 C.F.R. § 702.339. Accordingly, I conclude Claimant is not unduly prejudiced by the determination that Employer/Carrier never waived their timeliness defense.

3. The Applicable Time Limit for Claimant's Request for Modification of the July 2, 1999 Decision and Order

Section 22 of the Act provides that modification is proper "at any time prior to one year after the date of last payment of compensation." 33 U.S.C. § 922. In the case of an award of benefits, the motion for modification must be filed within one year of the last actual payment of compensation. Metropolitan Stevedore Company v. Rambo (Rambo II), 521 U.S. 121 (1997); Intercounty Constr. Corp., 422 U.S. 1, 9 (1975) (the one-year limit under Section 22 of the Act is to be strictly construed).

After the July 1999 Decision and Order awarding benefits, Employer/Carrier's last actual payment of compensation occurred on July 29, 1999. (EX-9). Accordingly, to be timely under Section 22 of the Act, Claimant needed to seek modification by July 31, 2000, which is the first business day after Saturday, July 29, 2000, which is 365 days from July 30, 1999. See 29 C.F.R. § 18.4.

Claimant alternatively argues that his request for modification is timely because the July 2, 1999 Decision and Order was never a final order under Lazarus v. Chevron U.S.A., Inc., 958 F.2d 1297 (5th Cir. 1992)(for a compensation order to be final for the purposes of enforcement proceedings under Section 18(a) of the Act, it must adequately state the amount of compensation owed to claimant). Consequently, Claimant argues that the July 2, 1999 Decision and Order never became final until the June 11, 2002 Supplemental Order. Thus, Claimant concludes that his March 2000 motion to clarify filed with this office should be construed as a timely motion for reconsideration under 20 C.F.R. § 802.206.

Claimant's reliance on Lazarus is misplaced. There, the matter involved enforcement of a supplementary order issued by a deputy commissioner of DOL under Section 18(a) of the Act. Lazarus, 25 BRBS at 145. Because this matter involves the timeliness of a modification request under Section 22 of the Act, I find the holding of Lazarus is not analogous to this matter nor helpful for a resolution of this issue. As Claimant noted in his January 16, 2001 Application for Default Pursuant to Section 18(a) of the Act, the July 2, 1999 "Decision and Order were served on EMPLOYER/CARRIER [sic] by certified mail and no appeal was filed within thirty days of their receipt of that order which now makes that decision final." (CX-36, p. 5). Regardless, non-final orders may be modified. See Craig v. United Church of Christ, Comm'n for Racial Justice, 13 BRBS 567 (1981)(the statutory language of Section 22 as amended implicitly provides that non-final orders may be modified) (citing 20 C.F.R. § 702.373).

Moreover, 20 C.F.R. § 802.206 provides that a motion for reconsideration must be filed "not later than 10 days from the date the decision or order was filed in the Office of the Deputy Commissioner," to be timely. Assuming **arguendo** Claimant's prior counsel filed a Motion for Reconsideration in March 2000, which I find is not established in the record, such a request is untimely. March 2000 exceeds 10 days after the July 2, 1999 Decision and Order was filed in the Office of the District Director on July 23, 1999.

Accordingly, because this matter involves a claim for modification of an award of benefits under Section 22 of the Act, Lazarus is inapplicable, and Claimant had one year from the date of last actual payment of compensation by Employer/Carrier on July 29, 1999 to request a modification under Section 22 of the Act. Thus, Claimant must have filed his request for modification under Section 22 of the Act by July 31, 2000 to be timely, as discussed above.

4. Whether Claimant Timely Filed a Request for Modification under Section 22 of the Act

A request for modification need not be formal, but must be a writing or verbal notice indicating an **actual intention to seek compensation for a particular loss**. Fireman's Fund Ins. Co. v. Bergeron, 493 F.2d 545, 547 (5th Cir. 1974) (a memorandum recording by a deputy commissioner of a telephone message from claimant's attorney that "the claimant is permanently totally disable [sic] and will file for review under Section 22 of the Act" was sufficient to constitute an application for modification under Section 22 of the Act); I.T.O. Corp. of Virginia v. Pettus, 73 F.3d 523, 527 (4th Cir. 1996) (one-sentence letters claiming benefits for "any and all benefits my client may be entitled to pursuant to the [Act]" failed to assert claims for any specific benefits); Greathouse v. Newport News Shipbuilding and Dry Dock Co., 146 F.3d 224 (4th Cir. 1998)(a physician's report that a claimant's disability may increase in the future was filed within one year of the last payment of compensation; however, the filing was not sufficient as a timely request for modification under the Act because the employer could not have reasonably concluded that the claimant was requesting modification); Gilliam v. Newport News Shipbuilding & Dry Dock Co., 35 BRBS 69 (2001) (a request was valid because it specifically noted that the party was seeking modification, claimed a deteriorating condition, and referenced a claimed disability purportedly in existence at the time that the request was made).

Claimant argues that a valid request to modify the prior Decision and Order under Section 22 of the Act was made by way of a March 8, 2000 motion to clarify, which was filed with this office by his former counsel but later withdrawn on March 29, 2000 in favor of seeking default and enforcement of the prior Order with the District Director. In I.T.O., the Court disagreed with the Director of OWCP, who argued that Section 22 of the Act allows "threadbare letters" to initiate the review process without any subsequent action on the part of the District Director. 73 F.3d at 527. According to the Court,

> Section 922's requirement that review commence within one year is not automatically fulfilled by just any communication from the claimant. [33 U.S.C. § 922.] A request for modification constitutes the commencement of review only if it is sufficient to initiate the process required under Section 922, a process whose next step must occur within ten days of claimant's request for modification. While a claimant's application for modification need not meet any particular form, there must be some basis for a reasonable person to conclude that a modification request has been made.

Id.

In I.T.O., the Court noted that neither of claimant's letters induced any action on the part of the District Director. Id. The District Director did not regard claimant's letters as requests for modification under Section 22. Had the District Director been able to ascertain an intention to seek compensation for a particular loss, he would have notified the employer, the next step in the statutory review process pursuant to Section 19(b) of the Act. The employer received no such notice, nor did the District Director proceed with any investigation, conference, or hearing pursuant to Section 19(c) of the Act. Id.

The Court in I.T.O. found that claimant's letters were "too sparse" to meet even the "most lenient of standards." The letters made no reference to any change in his condition, to a mistake of fact in the earlier order, to additional evidence concerning claimant's disability, to dissatisfaction with the earlier order, or to anything that would alert a reasonable person that the earlier compensation award might warrant modification. Thus, the letters failed to indicate any actual intention on the part of the claimant to seek compensation for a particular loss, "a factor that is critical in assessing their sufficiency." Id.

Consequently, in I.T.O., a subsequent letter, which the Court found established the claimant's requisite intent, but which was received more than one year after the date of last actual compensation, was found to be untimely. The Court held that the power granted to the District Director by Congress to review the claimant's compensation order had expired. Accordingly, the claimant and the District Director "ran afoul of Congress' [sic] 'one-year time limit imposed on the power of the [District Director] to modify existing orders.'" Id. at 528 (citing Intercounty, 422 U.S. at 11).

Likewise, under the present facts, the March 2000 pleadings and correspondence filed by Claimant's former counsel prompted no action by the District Director. The District Director did not regard Claimant's pleadings as requests for modification under Section 22 of the Act. Had the District Director been able to ascertain an intention to seek compensation for a particular loss, he would have notified Employer/Carrier, who received no such notice. As a result of Claimant's letter and motions, the District Director did not proceed with any investigation, conference, or hearing regarding any claims for a particular loss. Rather, the issues presented to the District Director involved default and enforcement of the original order.

Moreover, Claimant's March 2000 pleadings and correspondence made no reference to any change in his condition, any mistake of fact in the earlier order, additional evidence concerning his disability, dissatisfaction with the earlier order, or anything that would alert a reasonable person that the earlier compensation award might warrant modification.

Rather, he specifically sought "that the obligation of the Employer/Carrier relating to Claimant's medical bills under the [prior] Order, an enforcement of the Order be clarified...." (CX-36B, p. 2). He presented a copy of the previous Order, which "required that the Employer and Carrier be responsible for certain of Claimant's past medical bills, and be responsible for continuing medical care for Claimant's condition." He also provided a copy of medical expenses which Employer/Carrier declined to pay. He concluded by requesting an Order to confirm that the bills were related to his compensable injury and to compel Employer/Carrier to pay the medical bills and authorize reasonable and necessary medical care. (CX-36B, pp. 2-3). Thus, his pleadings failed to indicate any actual intention to seek compensation for a particular loss rather than to seek enforcement of the original Decision and Order.

Further, there is no evidence in the record that Claimant's physical or economic condition as a result of his compensable injury changed from July 2, 1999 until March 2000, when he filed his pleadings and correspondence requesting clarification and enforcement of the prior Order. Likewise, there is no evidence of any mistake in fact which became known to Claimant in March 2000 warranting a request for modification. At the hearing and in Claimant's Post-hearing Brief, his counsel specifically argued that, with the help of a recently hired vocational expert, he discovered incomplete medical records, on an unspecified date, which became the basis of his theory that modification is appropriate due to a mistake in fact. (Clt. Post-hrg. Br. pp. 4-5; Tr. 10).

Thus, it arguably follows that Claimant's prior counsel, who hired no expert to search the medical records, had no reason to believe there was any mistake of fact when he sought to enforce the prior Order based on existing medical records and bills. Accordingly, a finding that Claimant's March 2000 pleadings constituted a request for modification based on a mistake of fact would be irrational in the absence of any facts supporting such a claim in existence at that time.

Without any supporting facts indicating a change in condition or mistake in fact, I find Claimant's alleged request for modification constitutes an attempt to preserve indefinitely the right to seek modification, which is an impermissible protective filing. Meekins v.Newport News Shipbuilding & Dry Dock Co., 34 BRBS 5 (2000) (a letter was an anticipatory filing inasmuch as it did not identify a particular disability). Therefore, I find that Claimant's March 2000 pleadings are insufficient to establish an intention to seek compensation for a particular loss. There is otherwise no evidence in the record that Claimant intended to seek compensation for a loss prior to July 31, 2000.

After Claimant hired new counsel in July 2000, the record indicates Claimant continued to pursue enforcement rather than modification of the prior Decision and Order. He filed suit in Federal District Court in August 2000, seeking default and enforcement of the prior Order. Thereafter, in January 2001, Claimant sought an Amended Motion to Clarify and Application for Default Pursuant to Section 18(a) of the Act in which he raised no new issues warranting a hearing.

In light of the foregoing, there were no indications of record that Claimant was seeking compensation for any particular loss. Consequently, Employer/Carrier could not reasonably have known Claimant was seeking additional benefits. Thus, Claimant's pleadings and correspondence prior to July 31, 2000 were insufficient to establish an intent to modify the previous award.

Accordingly, I find any correspondence seeking modification under Section 22 of the Act received after July 31, 2000 to be untimely because the power granted by Congress to review Claimant's compensation order expired. A contrary conclusion would undermine the Congressional one-year time limit to modify existing orders. Thus, Claimant's request for modification on June 18, 2001 was not timely filed.

Claimant's attorney alternatively argued that missing medical records were either a "mistake in fact or an error of prior counsel." (Tr. 18). He also explained that there was an

error made by failing to submit medical records to this office at the original hearing. (Tr. 42). Section 22 is not intended to provide a back-door route to retry a case, or to protect litigants from their counsels' litigation mistakes. Kinlaw v. Stevens Shipping and Terminal Co., 33 BRBS 68 (1999) (the Board upheld an administrative law judge's denial of a Section 22 modification request where the employer's only explanation for not developing testimony previously was its erroneous belief that it was unnecessary). That Claimant's new counsel may have presented other evidence or proceeded under another theory than that presented by former counsel does not justify a modification request. Thus, Claimant's request for modification is improper insofar as it seeks to retry the case or to protect against prior litigation mistakes.

Consequently, Claimant's request for modification fails to timely or properly raise new issues regarding the previous award, which shall not be disturbed.

B. Substantive Issues

1. Claimant's Recurring Flank Hernia

Claimant indicated a new claim was filed at the time the present motion for reconsideration was filed; however, he contends that he suffers from a recurring flank hernia that is the result of his March 1993 surgery for his compensable flank hernia condition and should be considered in this matter. Employer/Carrier argue Claimant's recurrent hernia is the result of an intervening cause, namely Claimant's automobile accident and his non-compensable heart and lung conditions. Assuming **arguendo** that the claim for a recurring hernia should be considered in the present matter, I find that Claimant's recurring hernia is the result of an unrelated, intervening cause rather than the result of his original compensable injury.

If there has been a **subsequent non-work-related injury or aggravation,** the employer is liable for the entire disability if the second injury is the natural or unavoidable result of the first injury. Atlantic Marine v. Bruce, 661 F.2d 898, 14 BRBS 63 (CRT) (5th Cir. 1981); Cyr v. Crescent Wharf & Warehouse Co., 211 F.2d 454 (9th Cir. 1954)(If an employee who is suffering from a compensable injury sustains an additional injury as a natural result of the primary injury, the two may be said to fuse into one compensable injury); Mijangos v. Avondale Shipyards, 19 BRBS 15 (1986).

If, however, the subsequent injury or aggravation is not a natural or unavoidable result of the work injury, but is the

result of an intervening cause such as the employee's intentional or negligent conduct, the employer is relieved of liability attributable to the subsequent injury. Shell Offshore, Inc. v. Director, OWCP, 122 F.3d 312, 31 BRBS 129 (CRT)(5th Cir. 1997); Voris v. Texas Employers Ins. Ass'n, 190 F.2d 929, 934 (5th Cir. 1951)(a supervening cause is an influence originating entirely outside of employment that overpowers and nullifies the initial injury); Mississippi Coast Marine v. Bosarge, 637 F.2d 994, 1000 (5th Cir. 1981)(a simple worsening can give rise to a supervening cause); Bludworth Shipyard v. Lira, 700 F.2d 1046, 15 BRBS 120 (CRT) (5th Cir. 1983); Cyr v. Crescent Wharf & Warehouse Co., supra; Grumbley v. Eastern Associated Terminals Co., 9 BRBS 650 (1979); Marsala v. Triple A South, 14 BRBS 39, 42 (1981) (the intentional or negligent conduct of a third party may constitute an intervening cause of a subsequent injury occurring outside work so as to relieve the employer of liability for that injury).

Moreover, if there has been a subsequent non work-related event, an employer can establish rebuttal of the Section 20(a) presumption by producing substantial evidence that Claimant's condition was caused by the subsequent non work-related event; in such a case, employer must additionally establish that the first work-related injury did not cause the second accident. See James v. Pate Stevedoring Co., 22 BRBS 271 (1989).

In the present matter, Claimant's July 1998 automobile accident was the result of third-party negligence, which caused the accident. Moreover, there is no allegation or evidence that Claimant's work-related injury caused the accident. Accordingly, I find Claimant's accident after his work-related injury was not the natural or unavoidable result of Claimant's work-related injury. Thus, the intentional or negligent conduct of the third party may constitute an intervening cause of a subsequent injury occurring outside of work to relieve Employer's liability for the injuries.

Dr. Leblanc performed surgery on Claimant, and his credentials regarding the care and treatment of hernias are superior to the other physicians of record; however, Claimant's significant history of an automobile accident, as discussed below, was not provided to him, which diminishes the probative value of his opinion. Nevertheless, he specifically and unequivocally opined that Claimant's scar tissue, which was "not at all unusual," would not aggravate his hernia condition. Moreover, while surgery itself may create a defect in the fascia, Dr. LeBlanc opined that most hernias recur within a six-month period and that the chance for recurrence of a hernia is minimized after three years, within which 75 to 80 percent of all hernias recur. The latent appearance of Claimant's alleged

recurrent flank hernia, which was diagnosed in 2001, roughly eight years after his surgery, makes it highly unbelievable that the recurrent flank hernia is the natural and unavoidable result of Claimant's original injury.

My conclusion that the recurrent flank hernia is unrelated to Claimant's job injury is buttressed by Claimant's own testimony that he aggravated his hernia in the July 1998 automobile accident, after which his pain significantly increased. Likewise, Dr. Lew, who was afforded the benefit of Claimant's complete medical history including the automobile accident for which Claimant sought treatment with Dr. Lew, specifically opined that it was consistent that something happened at the time of Claimant's automobile accident, and that Claimant is having recurrent symptoms. Even if Claimant were not pain-free from 1993 until 1998, Dr. Lew persuasively opined that the injuries suffered in the accident cannot be ignored. Dr. Lew's opinion is supported by the opinions of Drs. LeBlanc and Staudinger, who opined that flank hernias may be caused by significant trauma to the area. Dr. Staudinger further supports Dr. Lew's conclusion insofar as he concluded that Claimant's history of an automobile accident as reported to Dr. Lew would be "significant history."

Claimant's testimony that the July 1998 automobile accident was a "little bump and scratch" is unpersuasive in establishing that the automobile accident was insignificant and did not aggravate his hernia condition. Claimant conceded the accident was "significant" and credibly testified that the accident aggravated his hernia condition and that none of the other painful activities he experienced after his job injury caused the same amount of increase in pain as the July 1998 automobile accident.

While he does not recall telling Dr. Lew that the automobile in which he was riding rolled over, Claimant can only remember that somebody found him "laying off the side of a road in a little ditch." Given the length of time since the automobile accident, I find that Claimant's brief recollection of events does not diminish the persuasiveness of the medical history provided in Dr. Lew's report shortly after the July 1998 accident.

Further, Claimant candidly admitted receiving a $7,000.00 settlement, plus medical treatment, for the accident in which he was a passenger. Claimant also asserted that he was not struck on the left side, as "that was the seatbelt," which arguably implies Claimant was wearing a seatbelt that traversed his abdomen, including the left side where the belt would fasten.

Meanwhile, there is no medical evidence that Claimant sought any treatment for his hernia condition for more than two years prior to his automobile accident. Consequently, the record supports a finding that Claimant suffered an aggravation of his hernia condition because of the significant trauma sustained from the automobile accident in July 1998.

Moreover, the record unquestionably establishes that Claimant suffers from other disorders of the heart, lungs and obesity, which Drs. LeBlanc and Staudinger agree can aggravate his hernia condition. Thus, under Greenwich Collieries, supra, I find Claimant failed to carry his burden of proof and persuasion to establish that his recurring hernia pain is the result of his 1992 job injury rather than the result of an intervening cause, namely his July 1998 automobile accident and his other non-compensable conditions, which worsened, overpowered and nullified it.

2. Entitlement to Medical Care and Benefits

Section 7(a) of the Act provides that:

> The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

33 U.S.C. § 907(a).

The Employer is liable for all medical expenses which are the natural and unavoidable result of the work injury. For medical expenses to be assessed against the Employer, the expense must be both reasonable and necessary. Pernell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). Medical care must also be appropriate for the injury. 20 C.F.R. § 702.402.

A claimant has established a **prima facie** case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-258 (1984).

Section 7 of the Act does not require that an injury be economically disabling for claimant to be entitled to medical benefits, but only that the injury be work-related and the medical treatment be appropriate for the injury. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 187.

Entitlement to medical benefits is never time-barred where a disability is related to a compensable injury. Weber v. Seattle Crescent Container Corp., 19 BRBS 146 (1980); Wendler v. American National Red Cross, 23 BRBS 408, 414 (1990).

An employer is not liable for past medical expenses unless the claimant first requested authorization prior to obtaining medical treatment, except in the cases of emergency, neglect or refusal. Schoen v. U.S. Chamber of Commerce, 30 BRBS 103 (1997); Maryland Shipbuilding & Drydock Co. v. Jenkins, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979), rev'g 6 BRBS 550 (1977). Once an employer has refused treatment or neglected to act on claimant's request for a physician, the claimant is no longer obligated to seek authorization from employer and need only establish that the treatment subsequently procured on his own initiative was necessary for treatment of the injury. Pirozzi v. Todd Shipyards Corp., 21 BRBS 294 (1988); Rieche v. Tracor Marine, 16 BRBS 272, 275 (1984).

The employer's refusal need not be unreasonable for the employee to be released from the obligation of seeking his employer's authorization of medical treatment. See generally 33 U.S.C. § 907(d)(1)(A). Refusal to authorize treatment or neglecting to provide treatment can only take place after there is an opportunity to provide care, such as after the claimant requests such care. Mattox v. Sun Shipbuilding & Dry Dock Co., 15 BRBS 162 (1982). Furthermore, the mere knowledge of a claimant's injury does not establish neglect or refusal if the claimant never requested care. Id.

Further, consent to change physicians **shall** be given when the employee's initial free choice was not of a specialist whose services are necessary for, and appropriate to, proper care and treatment. Consent **may** be given in other cases upon a showing of good cause for change. Slattery Assocs. v. Lloyd, 725 F.2d 780, 16 BRBS 44 (CRT) (D.C. Cir. 1984); Swain v. Bath Iron Works Corp., 14 BRBS 657 (1982). The regulation only states that Employer/Carrier may authorize a change for good cause; however, they are **not required** to authorize a change for this reason. Swain, 14 BRBS at 665.

Claimant contends he is entitled to receive treatment with Drs. Lew, Ostrowe, and LeBlanc because Employer/Carrier refused to authorize his choice of physician. Claimant asserts that Employer/Carrier bear the burden of establishing that he is not entitled to receive medical treatment with these physicians, relying on Roger's Terminal & Shipping Corp. v. Director, OWCP, 784 F.2d 687, 18 BRBS 79 (CRT) (5th Cir. 1986), cert. denied, 479 U.S. 826 (1986)(the employer bears the burden of establishing

that physicians who treated an injured worker were not authorized to provide treatment under Sections 7(b) and (c) of the Act). Employer/Carrier did not respond to Claimant's argument concerning his choice of physician.

Claimant's reliance on Roger's Terminal, supra, is misplaced. Employer/Carrier have not alleged that any of the physicians who treated Claimant were unauthorized for treatment under Section 7(b) or (c) of the Act. Rather, as noted above, Claimant has the burden of production and persuasion as the proponent of his position that Employer/Carrier are liable for his past medical treatment. Greenwich Collieries, supra.

There is no evidence nor any allegation that Claimant's treatment with Drs. Lew, Ostrowe, and LeBlanc was under any type of emergency. Thus, Claimant must have requested medical treatment for Employer/Carrier to be liable for past medical expenses. Claimant argues that the documentation submitted to the District Director and the undersigned demonstrates he has "continually requested medical treatment with specialists which Employer/Carrier refused to authorize."

Claimant requested medical treatment with Dr. Mary Jo Wright for a flank hernia on June 9, 2000 and with Dr. Larry H. Killebrew regarding an inguinal hernia on December 29, 2000. (CX-36, pp. 12-14). The credentials and specialties of Drs. Wright and Killebrew are not of record; however, Dr. Wright appears to be an assistant professor with Tulane University, specializing in general surgery. (CX-32, p. 1). Moreover, there is no evidence or allegation of an inguinal hernia suffered as a result of Claimant's October 1992 job injury. Thus, it is unclear how a refusal to authorize treatment for Drs. Wright and Killebrew amounts to Employer/Carrier's blanket denial of treatment for other physicians, including Drs. Lew, Ostrowe, and LeBlanc, whose specialities and credentials are of record.

Further, Claimant began treating with Dr. Lew, a pain specialist, after sustaining a significant injury in the 1998 automobile accident, as discussed above. Without any diagnosis or recommendation by Dr. Lew for surgery or for hernia treatment, Mrs. Ducote located Dr. LeBlanc, who specializes in surgery and hernias, to treat an allegedly painful hernia condition.

However, Dr. LeBlanc specifically opined that there was a very low probability that Claimant's hernia was strangulated or incarcerated to cause pain. Likewise, Dr. Staudinger found no evidence of strangulation or incarceration, which would be painful and reported if observed on a medical examination. Meanwhile, Claimant was referred to Dr. Ostrowe, another pain

specialist, but was "lost to follow-up" for no reason. On these facts, I find that there is insufficient evidence establishing that Drs. Lew, Ostrowe, or LeBlanc are specialists whose services are necessary for or appropriate to the proper care and treatment for Claimant's 1992 job injury.

Assuming **arguendo** Claimant established good cause to change physicians or that Employer/Carrier refused treatment or neglected to act on Claimant's request for physicians, I find Claimant failed to establish that the treatment subsequently procured on his own initiative was necessary for treatment of his job injury, namely a flank hernia.

It should be noted that there is no opinion of any qualified physician of record that Claimant's treatment after 1993 was necessary for his job injury. Rather, Dr. LeBlanc doubted the effectiveness of Claimant's "elective" surgery in August 2002 to treat his pain, because the source of pain was not likely related to his hernia. With Claimant's history of other complications, Dr. LeBlanc was "reluctant" to proceed with surgery, but Claimant "wanted it done."

Likewise, Dr. Staudinger was "doubtful" Claimant's hernia caused his pain and was also "doubtful" a surgical procedure would help or cure his symptoms. Similarly, as noted in the original Decision and Order, Dr. Steinberg, who performed Claimant's original March 1993 flank hernia surgery, was unsure at that time whether Claimant's hernia caused his pain, and was not certain surgery would resolve the pain. (CX-18, p. 16; CX-14, p. 36).

Dr. Ostrowe indicated Claimant's August 2002 surgery might "stand a chance" of being successful if Dr. LeBlanc, who treated Claimant surgically, felt the pain was due to a neuroma and could identify the "mass of prior surgery with nerve entrapment." However, Dr. LeBlanc offered no opinion that Claimant's pain was due to a neuroma and specifically observed "nothing at all unusual" about Claimant's scar tissue. He further opined that there was nothing unusual about Claimant's anatomy in the area of incision that would "set him apart" from other patients.

Drs. Ostrowe and LeBlanc agreed that Claimant would not need to return to Dr. Ostrowe for pain management if his April 23, 2002 surgery successfully left Claimant pain-free or significantly reduced his pain; however, Claimant credibly testified that his pain persisted after the surgery, and he returned for pain management with Dr. Lew, who continued providing palliative injections.

In light of the foregoing, I find that Claimant's surgery was elective rather than necessary, and was unsuccessfully performed to treat his pain, which is not related to his job injury, but rather his trauma suffered from his July 1998 automobile accident. Consequently, Claimant has failed to establish that the medical treatment subsequently procured on his own initiative was necessary for treatment of his job injury, namely a flank hernia.

Claimant alternatively argues that his pain may be caused by nerve damage associated with scar tissue residual from the 1993 flank hernia repair; however, I find his argument is not supported by the record.

In 1995, Dr. Dinh referred Claimant to Dr. Richardson for "intercostal neuralgia," which was never related to Claimant's job injury by any physician. (CX-31, p. 28). In 1996, Dr. Richardson, whose credentials are otherwise unknown in the record and who was not deposed by any party in this matter, apparently diagnosed left flank pain secondary to incisional hernia and repair; however, a review of his notes does not indicate a basis for a conclusion that Claimant suffered pain as a result of nerve damage due to scar tissue from surgery related to his job injury. I am not persuaded by the entries in his reports which fail to discuss his findings or reasoning regarding his conclusions. Accordingly, I do not find Dr. Richardson's diagnoses well-reasoned based on the facts presented.

Likewise, I am not persuaded by Dr. Lew's testimony insofar as he concludes that Claimant suffers pain as a result of nerve damage caused by the initial hernia repair. Dr. Lew offered his conclusion based on "a note to that effect" which he received "at some point." Such a conclusion is not well-reasoned. His conclusion is further belied by his own equivocal testimony that there is no definitive cause for Claimant's pain, which is possibly caused by an osteophyte which could have been aggravated in the 1998 automobile accident and which is in the same lower thoracic area as Claimant's pain.

Similarly, I am not persuaded by Dr. Ostrowe's testimony to conclude Claimant suffers pain from nerve damage related to scar tissue associated with his 1993 flank hernia repair. Dr. Ostrowe, who treated Claimant briefly until Claimant was "lost to follow-up," was never provided Claimant's history of the 1998 automobile accident which diminishes the probative value of his opinion. Further, Dr. Ostrowe opined that Claimant's nerve which was associated with his scar tissue was "not the same nerve" as that which reacted to injections. Rather, he was "assuming" that

there were nerves cut, causing a neuroma formation over the nerves.

As noted above, Dr. LeBlanc testified that there was "nothing unusual" about Claimant's anatomy and that his scar tissue was "not at all unusual" when he performed Claimant's hernia surgery in 2002. I find Dr. LeBlanc's opinion most persuasive in light of his superior credentials, experience, and surgical treatment of Claimant. Accordingly, I find the record does not support a conclusion that Claimant suffers pain as a result of nerve damage due to scar tissue associated with his 1993 flank hernia repair.

In light of the foregoing, I find that Claimant failed to carry his burden of proof and persuasion to establish that his ongoing pain is the result of nerve damage from scar tissue related to his 1993 surgery for a compensable flank hernia. Consequently, Claimant has failed to establish that the medical treatment subsequently procured on his own initiative was necessary for treatment of his flank hernia caused by his work accident. Thus, Claimant has failed to establish entitlement to reimbursement for his past medical treatments.

Insofar as Claimant asserts he is entitled to future medical benefits, that determination has already been made in the July 1999 Decision and Order, which remains undisturbed by the findings in the instant Decision and Order.

V. PENALTIES AND INTEREST

Entitlement to additional past due compensation payments has not been established in this matter, and no benefits have been awarded in this Decision and Order, which does not depart from the original Decision and Order. Consequently, no awards of penalties or interest are appropriate at this time.

VI. ATTORNEY'S FEES

For a fee to be awarded pursuant to Section 28(a), the claimant's attorney must engage in a "successful prosecution" of the claim. 33 U.S.C. § 928(a); 20 C.F.R. § 702.134(a); Perkins v. Marine Terminals Corp., 673 F.2d 1097 (9th Cir. 1982); Petro-Weld, Inc. v. Luke, 619 F.2d 418 (5th Cir. 1980); American Stevedores, Inc. v. Salzano, 538 F.2d 933 (2d Cir. 1976); Rogers v. Ingalls Shipbuilding, Inc., 28 BRBS 89 (1993); Harms v. Stevedoring Servs. of America, 25 BRBS 375 (1992); Kinnes v. General Dynamics Corp., 25 BRBS 311 (1992). No award of

attorney's fees for services to the Claimant is made herein because Claimant's attorney did not engage in a successful prosecution of this claim. See Karacostas v. Port Stevedoring Co., 1 BRBS 128 (1974)(judge denied claim for compensation); Director, OWCP v. Hemingway Transp., Inc., 1 BRBS 73 (1974).

VII. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, Claimant's requests for modification of the previously issued Decision and Order, for a change of physicians and for additional permanent compensation and reimbursement for additional medical treatment are hereby **DENIED**.

ORDERED this 17th day of March, 2003, at Metairie, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge